SUPREME COURT, U. S.

DEC 2 1968

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IN THE

Supreme Court of the United States

October Term, 1968

No. 289

ELEANOR B. SNYDER, PAUL D. HUNTLEY and EILEEN HUNTLEY,

Petitioners

vs.

THE CITY OF BOULDER, a Colorado municipal corporation,

Respondent

Anthony F. Zarlengo
Capitol Life Center
Denver, Colorado 80203

James H. Snyder
P.O. Box 459
Boulder, Colorado 80302

Attorneys for Petitioners

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IN THE

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No. _____

ELEANOR B. SNYDER, PAUL D. HUNTLEY
and EILEEN HUNTLEY,

Petitioners

vs.

THE CITY OF BOULDER, a Colorado
municipal corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review a judgment of that Court reversing the judgment of the United States District Court in favor of the petitioners and remanding the case with instructions to dismiss the action for lack of jurisdiction.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 396 F (2) 853; as set forth in Appendix A, pp. 1 tc 7 inc.)

The written opinion of the United States District Court for the District of Colorado, not reported, denying defendant's (respondent herein) motion to dismiss for lack of jurisdiction for, inter alia, failure of the jurisdictional amount; as set forth in Appendix B, pp.1,2.

The memorandum opinion of the District Court made at the conclusion of the trial; as set forth in Appendix C, pp.1 to 8 inc.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment for petitioners and remanding the action to the District Court for dismissal for lack of jurisdiction was entered July 3, 1968. A timely petition for rehearing was denied September 6, 1968. The mandate has been stayed pending the filing of this petition for writ of certiorari.

Judgment was entered by the District Court in favor of petitioners on June 6, 1966.

The jurisdiction of this Court is invoked under Title 28, Sec. 1254 (1), of the U.S. Code.

QUESTIONS PRESENTED

Petitioners real properties were taken and damaged by the municipality in the course of a paving project done pursuant to ordinance. The District Court found a taking

of the properties in violation of the Federal and Colorado Constitutions and entered judgment for plaintiff in the amount of $1500 and for intervenors in the amount of $2000.

The District Court denied the motion to dismiss for lack of jurisdiction for failure of the jurisdictional amount filed by the municipality, holding that it could not be said to be a legal certainty that plaintiff had no reasonable expectation of recovery of the jurisdictional amount. Subsequently, the intervenors by order of Court filed their complaint. No challenge was made to the jurisdiction in the intervenors' action.

The Court of Appeals reversed on the ground that petitioners could not to a legal certainty recover the jurisdictional amount and directed dismissal for lack of jurisdiction. The questions presented are:

1. Assuming arguendo that the jurisdictional sum is a requisite to jurisdiction, whether the measure of damages used by the Court of Appeals in this action is in conflict with the law of the state of Colorado as enunciated by the Supreme Court of Colorado.

2. Whether the decision of the Court of Appeals, in holding that the only element for measure of damages is the reduction in value of the lands formerly serviced by the water, is in conflict with the decisions of this Court and the decisions of other Courts of Appeals.

3. Whether the decision in this action, which uses a measure of damages in conflict with the law of the state of Colorado, in effect denies equal protection of the law to citizens of the state of Colorado, and constitutes an usurpation of state authority by the Federal Court, contrary to

the U.S. Constitution, Article IV, Sec. 2 (1) and the Tenth Amendment respectively.

4. Whether the Court of Appeals, in using the testimony of petitioners and other witnesses at the trial in determining the lack of jurisdictional amount to a "legal certainty", used a test that is in conflict with the decisions of this Court and in conflict with the decisions of other Courts of Appeals.

5. Whether this action comes within the purview of the Federal Civil Rights Act, Title 28, Sec. 1343, U.S. Code, and therefore no jurisdictional sum is required.

6. Whether the decision of the Court of Appeals in this action, in holding that property rights are not within the contemplation of the Federal Civil Rights Act, is in conflict with the decisions of other Courts of Appeals.

7. Whether the right of petitioners to hold their property free of taking except by due process of law and payment of compensation therefor, constitutes a right of immunity granted them by the Federal Constitution and a personal right protected by the Federal Civil Rights Act, Title 28, Sec. 1343, U.S. Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Sec. 2 (1), of the U.S. Code Constitution provides as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Tenth Amendment of the U.S. Code Constitution provides as follows:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The 14th Amendment, Sec. 1, of the U.S. Code Constitution provides as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28. Sec. 1331, of the U.S. Code provides as follows:

> (a) "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, Sec. 1343, U.S. Code provides as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of

any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;".

STATEMENT OF THE CASE

The basis for jurisdiction in the District Court is the 14th Amendment, Sec. 1, of the U.S. Constitution; Title 28, Sec. 1331, of the U.S. Code; and Title 28, Sec. 1343, of the U.S. Code.

This case originated in the U.S. District Court for the District of Colorado upon the complaint of petitioner Eleanor B. Snyder (R.1,2,3; Appen. D,p.1,2,3) for the taking and damaging of her real property situate in the City of Boulder by the City of Boulder, Colorado in the course of a street improvement project pursuant to ordinance; all in violation of her rights under the 14th Amendment, Sec. 1, of the U.S. Constitution. The real property affected consisted of water rights, laterals and flowage easements for the carrying of water, and damage to the land formerly serviced by the water. She sought $25,000 damages.

The Silver Lake Ditch and Reservoir Company, a corporation, was joined as a party defendant but it was voluntarily dismissed by plaintiff without prejudice pursuant to Court order (R.41).

Petitioners Paul and Eileen Huntley intervened in the case as parties plaintiffs, pursuant to Court order (R. 32), adopted the complaint of plaintiff (Appen. E, p.1) and sought damages in the amount of $25,000 for the tak-

ing and damaging of their real property by the City of Boulder in the course of the paving project; their property likewise consisting of water rights, irrigation laterals and flowage easements, and damage to the land serviced by the water.

The City of Boulder at the outset of the case filed a motion to dismiss plaintiff's complaint for lack of jurisdiction for failure of the jurisdictional amount, which the District Court denied by Court order (R. 13,14; Appen.B, pp.1,2) saying "that it could not be said to a legal certainty that there was no reasonable expectation of recovery in an amount within the jurisdictional requirements". No challenge to the jurisdiction was made against the complaint of intervenors. The Court's pre-trial order (R. 64) and findings and conclusions after the trial (R. 106) held that the Court had jurisdiction of the case. The Court stated at the conclusion of the trial that "The allegation is sufficient to give the Court Jurisdiction" (App. C p. 7)

Trial was to the Court and judgment for plaintiff for $1500 and for intervenors in the amount of $2000 (R. 106). The District Court in its findings and conclusions (R. 104 to 107 inc.) held: That there was taking of the properties in violation of the Federal and Colorado Constitutions; that the street improvement project was pursuant to ordinance; that petitioners water rights were by deed; that the lateral destroyed was about eight blocks long and crossed about twenty parcels of land between petitioners' lands and the main ditch over which parcels petitioners had easements for flowage; that their lands had been supplied water by the ditch for more than fifty years before its destruction and no water was available to them since that time; that their flowage easements had been destroyed; and that they had received no compensation for the properties taken.

The record showed petitioners' lands had a firm supply of water from the ditch for the past sixty years before the destruction of the lateral, with the plaintiff's land receiving approximately 522,000 gallons each irrigation season and intervenors' lands approximately 1,524,000 gallons each season (R. 160,162).

The complaints charged the city with converting the water to its own use for sale and distribution through its waterworks system. The city's exhibit F, a contract between it and the Silver Lake Ditch and Reservoir Co., showed that the unused water of the ditch company reverted to the city and became its property. And the record showed that the water was retained in the city's reservoir and went into its waterworks system (R. 170, 199). Petitioners offer of value of the water, value of the easements, and loss of trees and shrubs was rejected by the trial court (R.105,106,107).

The Court of Appeals held that "the trial judge properly ruled that the destruction of the ditch lateral and accompanying water rights was a partial taking", it reversed the judgment and directed the action be dismissed for lack of jurisdiction on the ground that, as a matter of law, there was a failure of the jurisdictional amount; the Court saying: "It was thus a 'legal certainty' that plaintiff and intervenors could not, and under their own evidence never could, recover the amount requisite to support federal jurisdiction under 28 U.S.C. 1331" (Appen. A, p. 6).

The Court of Appeals rejected petitioners' contention that they were entitled to recover the actual loss suffered, saying that: "The assertion that the claimants were entitled to recover the value of the lost water, plus diminution of the land serviced by the water, plus the value of all the easements carrying the water to the properties, plus the damage to trees and shrubs on the properties, plus the loss of en-

joyment in use of the water, plus personal injuries suffered from invasion of their rights, is simply untenable."; and the Court held that the proper measure of damages was the reduction in value of the lands serviced by the water (Appen. A,p.5).

And the Court rejected petitioners' contention that the conduct of the municipality came within the interdiction of the Federal Civil Rights Act, Title 28, Sec. 1343, U.S. Code, and therefore no jurisdictional amount was required; the Court saying that the section "cannot be employed in conjunction with the remedial provisions therefor—against municipalities, Monroe v. Pape, 365 U.S. 167 —, and does not 'embrace as a civil right the deprivation of a mere property right as in this case' " (App. A, p. 7).

Petitioners' petition for rehearing was denied September 6, 1968 without opinion. Petitioners contended in their petition for rehearing that the Court had used the wrong measure of damages and had failed to follow the law of Colorado; that the decision was in conflict with decisions of this Court and other Courts of Appeals; that the municipality in its paving project was functioning in its proprietary capacity and therefore the decision of Monroe v. Pape was not applicable; and that its holding that property rights were not subject to the Federal Civil Rights Law was in conflict with the decisions of other Courts of Appeals.

The Court of Appeals ordered the mandate stayed pending the disposition of this petition to be filed on or before December 4, 1968.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT MATTER PROPERLY DETERMIN-

ABLE BY STATE LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE STATE LAW. The decision of the Court of Appeals in restricting petitioners' possible recovery for the taking of their water rights, the destruction of their lateral and flowage easements, and diminution in value of their lands serviced by the water, to only the reduction in value of the lands serviced by the water, is in effect applying a measurement of damages in direct conflict with the law of Colorado as declared in Game and Fish Commission v. Farmers Irrigation Co., April 1967, 426 P(2) 562, 162 Colo.——— (not yet reported in the Colorado Reports). Thus the Court of Appeals has decided an important question of local law in conflict with applicable Colorado decisions.

The Game and Fish case, supra, involved the taking of plaintiffs water rights in violation of the federal and state constitutions, with plaintiffs asking and recovering compensation for the actual loss sustained by them, including expenses incurred obtaining a new source of water and inconvenience, annoyance and discomfort suffered by the taking. The attorney general for the Commission contended that the proper measure of damages was the difference in the value of the property immediately before and after the injury. The Court rejected this contention and affirmed, saying at pages 565,566

> "In Fort v. Brighton Ditch Company, 79 Colo. 462, 246 P 786, we said, inter alia: 'The rule to be applied should be such as to enable the jury to determine, as near as may be, the actual loss suffered.' See also Kenyon v. Bauman, 117 Colo. 150, 184 P (2) 502. In Farmers Irrigation Co. v. Game and Fish Commission, supra (149 Colo. 318,369 P2 557) we held that: 'A priority

> to the use of water for irrigation or domestic purposes is a property right and as such is fully protected by the constitutional guaranties relating to property in general.'*** That loss necessarily includes out-of-pocket expenses incurred by those suffering the damage in an effort to avoid the consequences of the defendants' acts resulting in the loss. The plaintiffs in this action cannot be limited in their claims for 'damage' to property by the measure of damages usually applied in actions in condemnation of private property for a public purpose. This is not a condemnation action."

The only difference factually in the Game and Fish case and the one at bar is that in the Game case the water was returned to the owners in a polluted form, whereas in this action the water was kept by the city for distribution.

And the Court of Appeals decision is in conflict with Colorado law as it applies to strictly condemnation proceedings, which hold that the proper measure of compensation in condemnation is the value of the land or property actually taken plus the damage, if any, to the residue thereof. See Colo. R.S. 1963, 50-1-18, as amended.

In Department of Highways v. Schulhoff, Sept. 1968, 445 P2 402, 162 Colo. ——— (not yet reported), the Colorado Supreme Court held the proper measure of damage in condemnation was the actual value of the land taken, including damage to the residue, saying at p.407:

> "The Schulhoffs assign as cross error the refusal of the trial court to strike the testimony of one of the state appraisers. They contend that this ap-

> praiser used the 'before and after' rule, i.e., that he determined the value of the entire tract before the taking, then determined the value of the residue after the taking, using the difference between the two as the basis for determining the compensation to be paid to the Schulhoffs. It the state appraiser had so testified, we would agree the assignment of cross error.***Pursuant to C.R.S. 1963, 50-1-17 and R.R.S. 1963, 50-1-18 the measure of compensation to be paid in a case of this kind is the actual value of the property taken."

In its holding that the only property right compensable was the item of severance damage and disregarding the value of the water itself, loss from the destruction of the lateral and flowage easements, loss of trees and shrubs, loss of use and enjoyment of the property, inconvenience, annoyance and discomfort and other permissable items of recovery, the decision failed to follow the applicable state law. The law of Colorado recognizes these items as compensable: Water rights which are held to be property separate and apart from the land on which it is used. (See Sherwood Irrigation Co. v. Vanderwork, 138 Colo. 261, 331 P2 810; Nielson v. Newmyer, 123 Colo. 189, 228 P2 456); that flowage easements are separate property rights. (See Valley Development Co. v. Weeks, 1961, 147 Colo. 591, 364 P2 730); annoyance, inconvenience and discomfort resulting from the taking of water rights and out-of-pocket expenses incurred to avoid consequences of the taking (See Game and Fish Commission v. Farmers Irrigation Co., supra, 426 P2 562); and under certain circumstances mental suffering resulting from invasion of property rights in water and irrigation laterals (See Valley Development Co. v. Weeks, supra, 364 P2 730).

State law provides recovery for actual loss suffered which rule the decision failed to apply when holding that there was no recovery of the jurisdictional amount to a legal certainty.

2. THE DECISION PROBABLY IS IN CONFLICT IN SUBSTANCE WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS. Its holding that petitioners are limited to severance damage in determining the recoverable sum seems to be in conflict with the following decisions of this Court: United States v. Virginia Electric and Power Co., 365 U.S. 624; International Paper Co. v. United States, 282 U.S. 399; Seaboard Air Line R. Co. v. United States, 261 U.S. 299; United States v. General Motors Corp., 323 U.S. 373; Bauman v. Ross, 167 U.S. 548; and Baltimore and Potomac R. v. Fifth Baptist Church, 108 U.S. 317.

United States v. Virginia Electric and Power Co., supra, 365 U.S. 624, held that flowage easements were property rights with value, and that the destruction of same constituted a taking within the meaning of the U.S. Constitution.

International Paper Co. v. United States, supra, 282 U.S. 399, held in a condemnation proceeding that water rights taken constituted a compensable item for which the Government was bound by the U.S. Constitution to pay for.

In Seaboard Air Line R. Co. v. United States, supra, 261 U.S. 299, the Government contended in a condemnation that the owner was entitled to no more than the value of the land at time of taking. This Court held that the amount of compensation rested on equitable principles and that the owner should be put in as good a position as if the land had

not been taken, and that he was entitled to damages inflicted by the taking, including deprivation of use.

Bauman v. Ross, 167 U.S. 548, held where land was taken for a highway, that the value of the part taken was not the sole measure of compensation or damages to be paid, but that the owner was entitled also to severance damage, saying at page 575:

> " 'In estimating the damages, the Committee are not confined to the value of the land covered by the road, and the expense of fencing the ground. The owner may suffer much greater damage by the road by depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious—.' "

Baltimore and Potomac R. Co. v. Fifth Baptist Church, 108 U.S. 317, held that the mere depreciation of market value of property was not the only element of damage suffered by a church congregation from noise and smoke of passing trains, but that items of discomfort and annoyance to members of the congregation in the enjoyment of the property was also compensable.

In Ronzio v. Denver & R.G. R. Co., 10 Cir., 116 F (2) 604, the Court held that a water right was an independent property right, saying at p. 605:

> "A water right of appropriation is real estate independent of the ditch carrying the water, and independent of ownership or possession of any land—.' ".

Columbia Irrigation District v. United States, 9 Cir., 268 F2 128, involved a condemnation proceeding of all property of the district consisting of land, irrigation ditches and facilities and flowage easements. The court determined that the district was entitled at the trial, if proven, to compensation for land owned, severance damage to remainder, and for canals, ditches and other facilities and any flowage easements it might have.

3. THE DECISION IN NOT FOLLOWING APPLICABLE STATE LAW IN EFFECT DENIES EQUAL PROTECTION OF THE LAW TO CITIZENS OF THE STATE OF COLORADO AND USURPS STATE AUTHORITY. Thus the decision presents an issue of general importance, potentially recurring in nature, and it is in the public interest to have the issue decided by this Court.

The decision renders impossible equal protection of the law to citizens of Colorado, as required by Article IV, Sec. 2(1) of the U.S. Constitution. The decision, in fact, seems to present a reassertion of the doctrine declared in Swift v. Tyson, 16 Pet. 1, 10 L Ed. 865, which was disapproved by this Court in Erie Ry. Co. v. Tompkins, 304 U.S. 64. The decision is probably contrary to this Court's decision in Erie Ry. Co. v. Tompkins, supra.

And the decision by not following state law in an area belonging exclusively to the state is in effect usurping the state authority contrary to the interdiction of the Tenth Amendment of the U.S. Constitution.

The decision limits recovery in the federal court in the taking of water rights to severance damage, regardless of other property interests of the owner taken or damaged in the course of taking the water rights. But the law of

Colorado permits recovery for actual loss suffered. Therefore identical rights vary in value according whether enforcement is sought in the state court or in the federal court. A noncitizen of Colorado, by his privilege of selection of the forum, could benefit by selection of the federal court where the limited "before and after" rule of damages applies by virtue of the decision in this action. For example, a citizen of Colorado seeks compensation for the taking of his water rights and damage to his other properties resulting therefrom by another citizen of Colorado. He would be entitled to a hearing in the state court with the actual loss suffered being his measurement of damages. But if he sued a noncitizen of Colorado who had the right of removal to the federal court, then in that instance he would be subjected to a hearing in the federal court with application of the limited measurement of recovery as enunciated in this decision.

4. THE DECISION, IN SEEMINGLY USING TESTIMONY ADDUCED AT THE TRIAL TO DETERMINE THE JURISDICTIONAL AMOUNT, USED A TEST IN CONFLICT WITH THE TENTH CIRCUIT'S OWN DECISION AND IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS. The decision says: "Here, six witnesses, including plaintiff and the intervenors, testified for the claimants.*** It was thus a 'legal certainty' that plaintiff and intervenors could not, and under their own evidence never could, recover the amount requisite to support federal jurisdiction under 28 U.S.C. 1331." (Appen. A, p. 6)

Such use of evidence as a determinative factor is contrary to that Court's own decision in Emland Builders Inc. v. Shea, 10 Cir., 359 F(2) 927, where defendant contended that because the evidence showed that the number of houses

built did not make the jurisdictional amount, the want of jurisdictional sum to a legal certainty existed and the case should have been dismissed. The Tenth Circuit rejected this contention, saying at page 930:

> "However, this is not the test.*** It could not be said that under the complaint evidence could not be introduced to justify a verdict of more than the jurisdictional amount."

The complaint in this action (Appen. D, p. 1, 2, 3), setting forth as it does substantial claims of injury to several property interests, presents a reasonable basis for recovery of the jurisdictional sum. In other words, reasonable expectations from the situation existing at the time of the action and not the amount recovered is the test. See St Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283.

In Burks v. Texas Co., 5 Cir., 211 F(2) 443, the action was for trespass to realty with the only evidence of damage being that of plaintiff who testified the damage was substantially below the jurisdictional amount. The trial court dismissed for failure of the jurisdictional amount which was reversed, the Court saying at p. 446:

> "The question was not the amount of damages that the jury was authorized to assess, but the amount of damages claimed — in good faith.** The good faith of the plaintiff is determinative of the issue if there is any reasonable basis to support the good faith asserted by him in the amount claimed."

And in Seth v. British Overseas Airways Corp., 1 Cir., 329 F (2) 302, the plaintiff, although asking for more

than $10,000 in his complaint for loss of items from his baggage, only recovered $331.60 at the trial. The evidence disclosed only two manuscripts were lost which were incapable of valuation and the Warsaw Convention limited recovery by weight. The defendant contended no jurisdictional amount to a legal certainty which was rejected, the Court saying at p. 305:

> "Seth's claim of loss having been made in good faith, his claim controls as to dismissal for want of jurisdictional amount, id. 303 U.S. at 288 (St Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283)."

The decision refers only to the evidence to support the conclusion of lack of jurisdictional amount to a legal certainty. This Court in the St Paul Mercury case and the Burks and Seith cases refer to good faith of the claimant with a reasonable expectation of recovery, as determined by the complaint. This conflict in decisions presents an important issue that should be decided by this Court to secure uniformity of decisions.

5. THE OPERATIVE FACTS OF THE COMPLAINTS BROUGHT THIS ACTION WITHIN THE PURVIEW OF THE FEDERAL CIVIL RIGHTS ACT, TITLE 28, SEC. 1343, U.S. CODE, AND THEREFORE NO JURISDICTIONAL AMOUNT IS REQUIRED TO VEST THE COURT WITH JURISDICTION. This raises the important question of the scope of the Federal Civil Rights Act and presents an important question of federal law which has not been, but should be, settled by this Court.

The decision (Appen. A, p. 7) states that "the section pertains to deprivation of civil rights and cannot be employed in conjunction with the remedial provisions therefor, 42 U.S.C. Sec. 1981 et seq. against municipalities, Monroe v. Pape, 365 U.S. 167, —."

Monroe v. Pape, supra, involving as it does police activity of the Chicago police force, determined the scope of the civil rights law only insofar as it applied to a municipality functioning in its sovereign or governmental capacity. But Monroe v. Pape did not touch upon, nor is it determinative of, the liability of the municipality under the Federal Civil Rights Act while functioning in its proprietary capacity.

The City of Boulder in the case at bar was acting under color of law, pursuant to ordinance, in the particular street improvement project resulting in injuries to petitioners. But in doing the construction work on the street, the municipality was functioning in its proprietary capacity. See Belcaro Realty Co. v. Norton, 103 Colo. 485, 87 P2 1114; City and County of Denver v. St James Touring Car Co., 68 Colo. 203, 188 P 734; and City of Denver v. Dunsmore, 7 Colo. 328, 3 P 705. And the municipality in its proprietary capacity is a "person" within the contemplation of the civil rights act, and Monroe v. Pape is not applicable. Being amenable to the civil rights act, the municipality became responsible thereunder when it deprived petitioners of their property rights in violation of the Federal Constitution. Thus no jurisdictional sum is required to give the Court jurisdiction under this law.

This Court in Monroe v. Pape, supra, commented on the statement of the House Conference Committee in its rejection of the Sherman amendment to the original civil rights act; the House Committee reporting that Congress had no power to impose obligation on any "town organization, the mere instrumentality for the administration of state law,"

Thus the House Committee seemingly distinguished between governmental and proprietary functions of a municipality in discussing proposed exemption of "town organization" from the civil rights act. And this distinction is made in the following cases which hold that the civil rights act has not abrogated the immunity of municipalities functioning in their governmental capacity as distinguished from their proprietary capacity: Hewitt v. City of Jacksonville, 5 Cir., 188 F2 423, cert. den. 342 U.S. 422; Charlton v. City of Hialeah, 5 Cir., 188 F2 422; Cobb v. City of Malden, 1 Cir., 202 F2 701; Cuiksa v. City of Mansfield, 6 Cir., 250 F2 700.

As stated by Mr. Justice Frankfurter in Monroe v. Pape, supra, the civil rights act, "since it is projected into the future, it is ambulatory in its scope". And the fifth circuit in Hornsby v. Allen, 1964, 326 F2 605, said that "The trend of recent cases (is) to accept more and more actions under the civil rights statute." And this thinking seems to be in agreement with the recent trend toward

removal of sovereign immunity in connection with misconduct on the part of governmental entities, including municipalities.

It is the rule of the state of Colorado that a municipality in its proprietary functions share no higher plane than, and is liable in the same manner as, any individual citizen. See City and County of Denver v. Publix Cab Co., 1957, 135 Colo. 132, 308 P2 1016; Spomer v. City of Grand Junction, 1960, 144 Colo. 207, 355 P2 960. And this is the general rule, Harris v. District of Columbia, 256 U.S. 650.

The paving project by which eight blocks of ditch was destroyed and water rights taken involved proprietary functions of the municipality. Likewise, conversion of the water for distribution in its waterworks system involved proprietary functions. See City of Englewood v. City and County of Denver, 123 Colo. 290, 229 P2 667; Pikes Peak Power Co. v. City of Colorado Springs, Colo., 105 F 1.

This Court in Monroe v. Pape, supra, did not pass upon this exact point. It raises an important question of the scope of the civil rights act and presents an important question of federal law which has not been, but should be, settled by this Court.

6. THE DECISION IN ITS HOLDING THAT THE FEDERAL CIVIL RIGHTS ACT DOES NOT EMBRACE PROPERTY RIGHTS IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS. This issue, too, presents an important question of federal law as to the scope of the civil rights act, which has not been, but should be, settled by this Court; particularly so

in view of the conflicting decisions of the Courts of Appeals on this subject.

The decision at bar held (App. A, p. 7) that the civil rights act "does not embrace as a civil right the deprivation of a mere property right as in this case." This holding is in conflict with the following decisions: Cobb v. City of Malden, 1 Cir., 202 F2 701; McGuire v. Sadler, 1964, 5 Cir., 337 F2 902; Hornsby v. Allen, 1964, 5 Cir., 326 F2 605; Progress Development Corporation v. Mitchell, 1961, 7 Cir., 286 F2 222; Adams v. City of Park Ridge, 7 Cir., 1961, 293 F2 585. And see Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, D.C. Ill., 1965; Fowler v. United States, 258 F. Supp. 638, D.C. Calif., 1966.

Thus a direct conflict exists between the tenth circuit and the first, fifth and seventh circuits on the scope of the civil rights act regarding applicability of the act to property rights. This raises an important question of federal law on the scope of the civil rights act, and involves a conflict of the courts, which questions should be resolved by this Court.

7. THE RIGHT TO DUE PROCESS OF LAW AND TO JUST COMPENSATION IN THE TAKING AND CONVERSION OF PROPERTY RIGHTS IS A RIGHT PROTECTED BY THE IMMUNITY CLAUSE OF THE FEDERAL CONSTITUTION, AND A RIGHT WITHIN THE PURVIEW OF THE CIVIL RIGHTS ACT. The rationale of this Court in Bell v. Hood, 327 U.S. 678, supports petitioners' contention that the taking of their property without the payment of just compensation constituted an invasion of their personal right of immunity guaranteed to them by the 14th Amendment of the U.S. Constitution. Likewise, Adams v. City of Park Ridge, supra, holds that

the rights not to be deprived of property without due process of law is a right secured by the Federal Constitution within the meaning of the Civil Rights Act, Section 1343. And in Mosher v. City of Boulder, Colo. D.C., 1964, 225 F. Supp. 32, the court said as to plaintiff's right not to have her property taken by the municipality without just compensation being an immunity protected by the 14th Amendment of the U.S. Constitution, said at page 37:

> "—, it is possible that the rationale of Bell v. Hood, 327 U.S. 678,—would persuade that the plaintiff's claimed immunity from taking without payment of just compensation would be supported—."

Petitioners' immunity from the taking of their property without just compensation in itself is a right protected by the civil rights act and therefore no jurisdictional sum is required to vest jurisdiction in the court. The case of Bell v. Hood, supra, supports this theory and petitioners respectfully ask this Court to apply the Bell v. Hood rationale to the case at bar. This presents an important question of sufficient public importance that it should be settled by this Court.

CONCLUSION

For the reasons stated above, it is respectfully contended that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Anthony F. Zarlengo
Capitol Life Center
Denver, Colorado 80203

James H. Snyder
P.O. Box 459
Boulder, Colorado 80302

Attorneys for Petitioners

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Page No. 1 of Appended Opinion of Court of Appeals.

United States Court of Appeals

TENTH CIRCUIT

July Term, 1968

THE CITY OF BOULDER, a Colorado municipal corporation,
Appellant,

v.

ELEANOR B. SNYDER, PAUL D. HUNTLEY, and EILEEN HUNTLEY,
Appellees.

No. 9425

Appeal From The United States District Court
For The District of Colorado

Bryan Morgan, Assistant City Attorney, (Peter C. Dietze, City Attorney, was with him on the brief) for Appellant.

James H. Snyder (Anthony F. Zarlengo was with him on the brief) for Appellees.

Before JONES*, LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

*Of the Fifth Circuit,: sitting by designation.

APPENDIX A-2

Page No. 2 of Appended Opinion of Court of Appeals.

The City of Boulder, Colorado, appeals from judgments rendered against it in favor of plaintiff-appellee Snyder and intervenors Huntley by the United States District Court for the District of Colorado after trial to the court. The judgments entered were for $1,500 in favor of plaintiff and $2,000 in favor of the intervenors. Appellant asserts, among other things, that at the conclusion of the trial the court should have dismissed the action for lack of jurisdiction springing from each appellee's failure to meet the amount-in-controversy requirement of 28 U.S.C. § 1331. We hold that the trial court erred in not so doing.

This suit was filed in 1962, plaintiff alleging damages of $25,000 for the wrongful taking of certain water rights by the City of Boulder and another defendant, The Silver Lake Ditch Company,[1] *caused by a street-paving project in front of her residence in the spring of 1956* which resulted in the destruction of a very small ditch lateral abutting and serving her property as a facility of the Ditch Company. The intervenors were similarly situated, living on the same street and being served by the same ditch.

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[1]This defendant was subsequently dismissed without prejudice and is not a party to this appeal.

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They adopted the plaintiff's complaint and alleged the same damages. Federal *jurisdiction was asserted to exist under the Fourteenth Amendment and the required*

amount in controversy. The complaint made no reference to any statute as a foundation for federal jurisdiction.

By *preliminary motion to dismiss appellant asserted a lack of federal jurisdiction claiming "there can be no reasonable expectation on part of plaintiff of recovering the jurisdictional amount. . . ."* In apparent reliance upon the allegations of the complaint, this motion was denied and the cause proceeded to trial. The trial judge,[2] basing his judgment upon the existence of a federal question, 28 U.S.C. § 1331, was acutely aware of the plaintiff's failure to meet the jurisdictional amount and in the following statement given when the judgment was announced imposed a partial sanction:

> "I think that the plaintiff has come so far from proving damages, actually, that should have given this Court jurisdiction. This Court has jurisdiction in cases involving Federal questions or Federal constitutional questions where the amount in controversy exceeds $10,000.00. This action, or the proof in this action, although

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[2]Judge Langley of the Eastern District of Oklahoma sitting in Colorado by assignment for the trial only.

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> the allegation is sufficient to give this Court jurisdiction, the proof is so far below it I am not going to award costs to the plaintiff. Each party will stand its own costs."

The denial of costs under authority of 28 U.S.C. § 1331(b) is an appropriate and adequate remedy in certain instances but when, as here, *a failure of proof of damage is so complete as to dictate the conclusion that resort to federal jurisdiction has been abused the proper disposition of the suit is dismissal.*

Jurisdiction under 28 U.S.C. § 1331 is improperly founded whenever it appears *as a "legal certainty" that* less than $10,000 is at issue in the controversy. St. Paul Indem. Co. v. Cab Co., 303 U.S. 283; F & S Constr. Co. v. Jensen, 10 Cir., 337 F_2 160. Under these cases a plaintiff's *good faith in choosing the federal forum is vulnerable at any time during trial as well as prior thereto,* and if it appears that *a plaintiff never was entitled to recover* the jurisdictional amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit must be dismissed. The actual amount recovered is not determinative of the issue and is relevant only if it is probative thereof.

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In the case at bar the *trial judge properly* ruled that the *destruction of the ditch lateral* and accompanying *water rights was a partial taking and that the proper measure of damages was the reduction in market value of the properties precipitated thereby.* There *was no showing of special circumstances which would make this basic rule incapable* of producing an equitable and just result. *See for comparison,* Big Five Mining Co. v. Left Hand Ditch Co., 73 Colo. 545, 216 Pac. 719, cited with approval in Freel v. Ozark-Mahoning Co., D. Colo., 208 F. Supp. 93.

Evidence relative to other items such as value of easements, loss of enjoyment, damage to trees and shrubs on the properties, etc. was properly excluded. The assertion that the claimants were entitled to recover the value of the lost water, plus the diminution in the value of the land serviced by the water, plus the value of all of the easements carrying the water to the properties, plus the damage to trees and shrubs on the properties, plus the loss of enjoyment in use of the water, plus personal injuries suffered from invasion of their rights, is simply untenable. Such a disposition would involve multiple recovery for the same loss and would be clearly contrary to the just and equitable result sought by all.

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The proper measure of damages for the unlawful taking of property is a matter of law; the amount of damages is a matter of fact to be determined by the factfinder within the confines of the evidence material and competent to probe the issue. Here, six witnesses, including plaintiff and the intervenors, testified for the claimants. Plaintiff testified that her land was worth $15,500 before the taking of her water, $13,500 after such taking. All other witnesses gave opinions that placed her damage at a lower amount. The highest opinion as to damage suffered by intervenors was the sum of $3,000. It was thus a "legal certainty" that plaintiff and intervenors could not, and under their own evidence never could, recover the amount requisite to support federal jurisdiction under 28 U.S.C. § 1331.

Although the judgment of the district court was clearly premised on the existence of a federal question and

appellees do not now question the court's application of section 1331(b) in denying recovery of costs to them, a contention is now made that jurisdiction is also present under 28 U.S.C. § 1343(3).[3] We find no merit to this

[3]"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
* * *

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contention.

It is true that the cited section provides a federal forum for enforcement of Fourteenth Amendment rights, Haskin v. Lockwood, 9 Cir., 361 F_2 499, *cert. denied,* 385 U.S. 960, and that in applicable cases the district courts have jurisdiction without regard to the amount in controversy. Howard v. Higgins, 10 Cir., 379 F_2 227. *But the section pertains to deprivation of civil rights and cannot be employed in conjunction with the remedial provisions therefor, 42 U.S.C. § 1981 et seq., against municipalities, Monroe v. Pape, 365 U.S. 167, and does not "embrace as a civil right the deprivation of a mere property right as in this case."* Howard v. Higgins, 10 Cir., 379 F_2 227.

The judgment is reversed and the case remanded with instructions to dismiss the action for lack of jurisdiction.

[3] (continued)
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

APPENDIX B-1

Page No. 1 of Appended Order of District Court Denying Defendant's Motion To Dismiss For Lack of Jurisdiction.

In the United States District Court

FOR THE DISTRICT OF COLORADO

Civil Action No. 7745

ELEANOR B. SNYDER,
Plaintiff,

vs.

THE CITY OF BOULDER, COLORADO, a municipal corporation, et al.,
Defendants.

ORDER

This matter is before the Court on defendant city's motion to dismiss for lack of jurisdiction over the subject matter.

Defendant alleges that (1) the complaint fails to raise a substantial federal question as an essential element of the plaintiff's cause of action upon the determination of which the result depends; and that (2) there can be no reasonable expectation, from the facts alleged in the plaintiff's complaint, of recovering the minimum jurisdictional amount.

First, it is the opinion of the Court that the very essence of the plaintiff's claim for relief is wrongful taking

of the plaintiff's water rights without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. The complaint alleges that the defendant is "engaged in the sale and distribution of water for irrigation and domestic purposes," and "for such purposes maintains and operates a water works;" that the defendant "wrongfully obstructed and destroyed the ditches and conduits servicing plaintiff's land;" that the defendant "did wrongfully and illegally take, appropriate and convert the said water rights of plaintiff for it's own use and for use of the general public;" and that "all of said illegal taking (was) for private and public purposes

APPENDIX B-2

Page No. 2 of Appended Order of District Court Denying Defendant's Motion To Dismiss For Lack of Jurisdiction.

without the payment of just compensation to plaintiff." Therefore, it appears to the Court that the complaint alleges facts which afford a basis for federal jurisdiction under the Constitution within the meaning of 28 U.S.C. Section 1331.

Next, the complaint alleges that the defendant's action in wrongfully taking the plaintiff's water rights has damaged the plaintiff in the amount of $15,000.00, and additional damages are asserted to have been incurred therefrom to the remaining part of the plaintiff's real property in the amount of $10,000. While those amounts may be speculative, the Court cannot say, in looking to the object which is sought to be accomplished by the plaintiff, that it appears legally certain that the plaintiff has no reasonable expectation of recovery of an amount within the jurisdictional requirement. It is therefore

ORDERED that the defendant city's motion to dismiss for lack of jurisdiction over the subject matter be, and the same hereby is, denied.

Dated at Denver, Colorado, this 24th day of January, A. D. 1963.

BY THE COURT:
/s/ Alfred A. Arraj
ALFRED A. ARRAJ,
Chief Judge
United States District Court

APPENDIX C-1

Page No. 1 of Appended District Court's Memorandum Opinion. Made At Conclusion of Trial.

In the United States District Court

FOR THE DISTRICT OF COLORADO

ELEANOR B. SNYDER,
Plaintiff,

-vs-

THE CITY OF BOULDER, COLORADO, et al.,
Defendants.

No. 7745 Civil

Transcript of the statements of the Court, had in the above entitled cause, April 26, 1966, in the United States Courthouse, Denver, Colorado.

APPEARANCES:

Mr. James H. Snyder, Attorney at Law, Denver, Colorado; Mr. Anthony F. Zarlengo, Attorney at Law, Denver, Colorado, for the plaintiff.

Mr. Neil C. King, Attorney at Law, Boulder, Colorado; Mr. Peter C. Deitze, Attorney at Law, Boulder, Colorado, for the defendants.

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Page No. 2 of Appended District Court's Memorandum Opinion Made at Conclusion of Trial.

THE COURT: Now, Gentlemen, after having heard your arguments I want to make a statement which will serve as the basis for the preparation of findings of fact and conclusions of law, and the judgment in this case. You may take notes on my statements or, of course, you can ask for a transcript. The filing of the findings of fact will be effective when they have been reduced to writing and signed and filed, and the effective date of the judgment will be when the written judgment has been filed. The reason for that is in order to fix a time for the running of the period during which you can take appeal, and that will fix an exact date, the filing of the judgment, and I think that is rather important because I think there is a good possibility that both parties will be unhappy with my decision.

I am going to find that this an action to recover compensation for an interest in real property taken by the City of Boulder, Colorado.

That the Snyders and Huntleys, and the plaintiff and intervenors in this case, were the owners of the property in Boulder to which their attached a right to take water from the Silver Lake Ditch Company.

I will also find, or intend to find that the maintenance of the lateral No. 11, which is the lateral along Hawthorn Street from the Main ditch was the obligation of the

APPENDIX C-3

Page No. 3 of Appended District Court's Memorandum Opinion Made At Conclusion of Trial.

property owners and not the obligation of the Silver Lake Ditch Company.

In 1956 the City of Boulder paved Hawthorn Street and in the process destroyed Lateral Number 11. This destruction of Lateral No. 11 effectively deprived plaintiff Snyder and the intervenors, Huntleys, properties, respective properties of their interest to take water from the Silver Lake Ditch. In that connection I find that this right to take water from the Silver Lake Ditch had not been abandoned at the time that the Lateral was destroyed in 1956.

I also find that the plaintiff and intervenors both had actual knowledge of the destruction of the lateral at the time the destruction took place.

It will be my finding that the difference in the value of the plaintiff's property, the Snyder property with the water right and the value of the Snyder property without

the water right, or that there was a difference in value of the property with the water right and without the water right of $1500.00. That is to say that the property without the water right was $1500.00 less than it would have been with the water right.

I will find that the Huntley property was worth $2,000.00 more with the water right than it was without the water right.

I will further find that the water right in question

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has no value except in relation to the specific properties of the plaintiff and the intervenors.

In this connection and with respect to the value that I put the difference on the value I will advise you by way of a statement or explanation that I attached little or no significance to the evaluation placed on the property on a before and after basis by the defendant, witness Ball. I feel that on cross-examination whatever merit his testimony may have had in response to direct examination was virtually destroyed by his admission that he had not taken into consideration the existence of these water rights in any substantial way.

By way of further explanation I attach very little importance to the evaluations placed on the loss in value of their properties by the property owners, by Mr. Huntley and by Mrs. Snyder. I don't consider them, although they

are qualified to express an opinion, I think their opinion as to the value is entitled to very little weight in the absence of any showing of substantial experience in this field.

And for your information, by way of explanation, I based my evaluation of the diminution in value of the properties almost entirely on the testimony of Mr. Thompson. I have taken the minimum figure that he has given on the theory that he is not apt to testify to one iota less than the reasonabie diminution in value.

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Page No. 5 of Appended District Court's Memorandum Opinion Made At Conclusion of Trial.

Now, by way of conclusion of law I concluded that this Court had jurisdiction. I concluded, as a matter of law, that the water right which I have found as a matter of fact to exist and not to have been abandoned is an appurtenant to the land of Mr. and Mrs. Huntley and Mrs. Snyder.

It's my conclusion, as a matter of law, that the destruction of Lateral No. 11 constituted a taking of an interest in the property of the plaintiff and of the intervenors for which they were entitled to compensation under the Federal and State Constitutions.

I further find as a conclusion of law that the obligation was on the City as the taker of the property to pay for the property taken, and notice or lack of notice is not determinative.

It's my conclusion that the plaintiff and the intervenors were under no obligation whatsoever in the matter.

The whole obligation was on the taker of their property in this instance, the taking being as, I have said, through the destruction of the Lateral, to make just compensation for whatever the diminution in value amounted to.

In that connection it's my conclusion, as a matter of law, that the proper measure of damage in this case is the diminution in value of the property resulting or by reason of the taking through the destruction of the water right as an appurtenant to the land.

APPENDIX C-6

Page No. 6 of Appended District Court's Memorandum Opinion Made at Conclusion of Trial.

I think the value of the cost of the easements across the intervening property owners is not proper to be considered for two reasons. One, it was not pled as an item of damages, but even it were, and even if an amendment had been permitted and had allowed the testimony to develop it, the testimony was offered, but I am disregarding it, I think it's not a proper measure of damages. I think in a case of this kind the only measure that can be used is the diminution in the value resulting from the taking.

It's my further conclusion, then, that the plaintiff, Mrs. Snyder, is entitled to judgment in the amount of $1500.00 against the defendant, City of Boulder, and that the intervenors, Mr. and Mrs. Huntley, are entitled to judgment in the amount of $2,000.00 against the City of Boulder.

In view of the failure of the plaintiff to come any where near proving — I will say as an explanation that I

totally disregard any concept of damages in a case of this character which attempts to project into the future what the difference in the cost between city water and ditch water might be. I think it's a wholly impractical method of no merit whatsoever. If you did that, then, wherever you fixed the termination date, you would have to do so arbitrarily and capriciously, there would be no way you could do it.

Insofar as laches is concerned, I think the doctrine

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Page No. 7 of Appended District Court's Memorandum Opinion Made at Conclusion of Trial.

of laches and the doctrine of estoppel neither has any applicability and it's my conclusion, as a matter of law.

Further it's my conclusion that the demand for delivery of the water or lack of demand for the delivery of water by the plaintiff and intervenors to the Silver Lake Ditch Company is immaterial.

And further it's my conclusion that this action is not barred by any statute of limitations.

I think that the plaintiff has come so far from proving damages, actually, that should have given this Court jurisdiction. This Court has jurisdiction in cases involving Federal questions or Federal constitutional questions where the amount in controversy exceeds $10,000.00. This action, or the proof in this action, although the allegation is sufficient to give this Court jurisdiction, the proof is so

far below it I am not going to award costs to the plaintiff. Each party will stand its own costs.

Now, if you have any questions, I don't mean that this is open for debate, but if you have any questions, if I haven't explained everything to you about the matter of appeal, please let me know now.

MR. ZARLENGO: I think Your Honor's explanation has been very lucid and very concise.

THE COURT: Any questions?

MR. KING: I don't have any questions,

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Page No. 8 of Appended District Court's Memorandum Opinion Made at Conclusion of Trial.

Your Honor.

THE COURT: Court will recess subject to call.

CERTIFIED A TRUE TRANSCRIPT

STEPHEN D. ALLEN

OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

APPENDIX D-1

Page No. 1 of Appended Complaint of Plaintiff

In the United States District Court

FOR THE DISTRICT OF COLORADO

Civil Action No. 7745

ELEANOR B. SNYDER,
Plaintiff

vs.

THE CITY OF BOULDER, COLORADO, A MUNICIPAL CORPORATION, AND THE SILVER LAKE DITCH AND RESERVOIR COMPANY, A CORPORATION,
Defendants

COMPLAINT

Comes now plaintiff and for her claim against the defendants and each of them alleges and states as follows:

1. This action arises under the Constitution of the United States, Article XIV, Section 1 (The 14th Amendment of the United States Constitution, Section 1) as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. The plaintiff at all the times hereinafter mentioned was, and is now, the owner of real property situate in the

City of Boulder, State of Colorado, with certain water rights, substantial in nature, appurtenant thereto and served by the conduits and ditches of the defendant The Silver Lake Ditch And Reservoir Company as more fully appears,

3. The defendant City of Boulder, Colorado is a municipal corporation duly organized and existing according to law, and during all the times herein mentioned was, and is now, engaged in the sale and distribution of water for irrigation and domestic purposes to the residents of the City of Boulder, and to the general public, and for such purpose maintains and operates a water works system.

4. The defendant The Silver Lake Ditch And Reservoir Company is a corporation organized and existing according to the law of the State of Colorado, and during all the times herein mentioned was, and is now, engaged in the carriage and distribution of irrigation water through its ditch system to users of water therefrom, and did supply water through its system to plaintiff's land for irrigation and domestic purposes until such time as the defendant City of Boulder

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Page No. 2 of Appended Complaint of Plaintiff

wrongfully obstructed and destroyed the ditches and conduits servicing plaintiff's land, as more fully appears.

5. That the defendant City of Boulder wrongfully and illegally interfered with, obstructed, and destroyed said ditches and conduits servicing plaintiff's land, and did *wrongfully and illegally take, appropriate and convert the said water rights of plaintiff for its own use and for use of* the general public, and for sale and distribution of same

through its own water works system to its customers; all of said illegal taking being for private and public purposes without the payment of just compensation to plaintiff.

6. That said wrongful and illegal taking, appropriation, and conversion by defendant City of Boulder of plaintiff's said water rights for private and public purposes without the payment of compensation to plaintiff therefor, constitutes a *taking and deprivation of plaintiff's property* without due process of law in contravention of plaintiff's constitutional guarantees as provided by Article XIV, Section 1, of the United States Constitution, and Article II, Sections 14, 15, and 25, of the Colorado Constitution.

7. That the said wrongful and illegal acts of defendant City of Boulder in the destruction of said ditches and conduits servicing plaintiff's land, and the wrongful and illegal taking of plaintiff's water supplied thereby, were without the knowledge and consent of plaintiff and without right or authority so to do, and in violation of her constitutional rights as mentioned aforesaid.

8. The defendant The Silver Lake Ditch And Reservoir Company did consent to and permit the defendant City of Boulder to interfere with, obstruct, and destroy said irrigation ditches and conduits servicing plaintiff's property, and to take plaintiff's water rights; all without right or authority so to do, and without the knowledge and consent of plaintiff.

9. That *plaintiff's said water rights illegally taken by defendant* City of Boulder are now, and will in the future continue to be, of *substantial value and use to plaintiff, and by reason* thereof plaintiff has been damaged in the sum of $15,000.00.

10. That plaintiff's said land was greatly enhanced in value by the existence of said water rights appurtenant thereto for irrigation and domestic uses and purposes, and the taking and deprivation of said water rights, thus requiring plaintiff to purchase water from defendant City of Boulder for irrigation purposes at metered rates, excessive in amount, has caused, and will in the future continue to cause, said property to be substantially of less value without said water rights, and plaintiff's real property by reason of said wrongful

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Page No. 3 of Appended Complaint of Plaintiff

and illegal acts of defendants has been damaged in the sum of $10,000.00.

WHEREFORE, plaintiff prays for judgment against the defendants *and each* of them in the sum of $15,000.00 as just compensation for *her property rights in water taken by the defendants, and for an additional sum of $10,000 as damages to the remaining part of said* real property, or a total of $25,000.00; for interest at the lawful rate on the value of said rights in real property taken and damaged, computed from the time same were taken and damaged; for such other and additional relief as the Court deems just and proper; and for her costs herein expended.

James H. Snyder
Attorney for Plaintiff
353 City and County Building
Denver, Colorado
MA 3-1133

Address of Plaintiff:
1050 Hawthorn Avenue
Boulder, Colorado

APPENDIX E

Page 1 of Appended Motion To Intervene as Plaintiffs

In the United States District Court

FOR THE DISTRICT OF COLORADO

Civil Action No. 7745

ELEANOR B. SNYDER,
Plaintiff

vs.

CITY OF BOULDER, COLORADO, a municipal corporation, AND THE SILVER LAKE DITCH AND RESERVOIR COMPANY, a corporation,
Defendants

PAUL D. HUNTLEY AND EILEEN J. HUNTLEY,
Applicants for Intervention

MOTION OF PAUL D. HUNTLEY AID EILEEN J. HUNTLEY TO INTERVENE AS PLAINTIFFS

Paul D. Huntley and Eileen J. Huntley move the Court for leave to intervene as plaintiffs, pursuant to Rule 24 of the Federal Rules of Civil Procedure, in order to assert their claim against defendants, and for such purpose adopt the allegations of the original complaint filed herein and make same a part of this motion as the proposed complaint of interveners, and further state:

1. They are owners of certain real estate situate at 1012 Hawthorn Avenue in the City of Boulder, Colorado, with water rights appurtenant thereto furnished by the ditch of defendant The Silver Lake Ditch and Reservoir Company; and were owners of said land prior to and at the time of destruction of the lateral mentioned in the original complaint.

2. That their said land contained a lateral for the carrying of irrigation water furnished by defendant The Silver Lake Ditch and Reservoir Company and was used by intervening plaintiffs for such purpose until same was destroyed by defendant City of Boulder, as mentioned in the original complaint.

3. That the lateral on their said land was a part of the lateral system carrying irrigation water from the ditch of said defendant ditch and reservoir company to land abutting the south side of Hawthorn Avenue from Broadway Street to 4th Street in said City of Boulder, including plaintiff's said land.

4. Applicants have a claim against defendants presenting both questions of law and fact which are common to the main action.

James H. Snyder
Attorney for Applicants
1050 Hawthorn Avenue
Boulder, Colorado

Address of Applicants:
1012 Hawthorn Avenue
Boulder, Colorado